

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILLIAM F. RUSSELL,

Plaintiff,

v.

ALAN HILBURG; individually; HILBURG &
ASSOCIATES, LLC; a limited liability
company; ALAN HILBURG & ASSOCIATES;
HAI HOLDINGS, INC., a corporation; PORTER
NOVELLI, INC., a corporation, d/b/a Porter
Novelli Consulting (aka PNConsulting); and
JOHN DOES and/or JANE DOES 1-3, presently
unknown parties,

Defendants.

No. C08-0217 RSM

PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT OF
DISMISSAL OF VARIOUS
AFFIRMATIVE DEFENSES OF
DEFENDANTS

ORAL ARGUMENT REQUESTED
HEARING DATE: February 6, 2009

I. MOTION

Comes now the plaintiff, William F. Russell, and hereby moves this court for partial summary judgment dismissing affirmative defenses. This motion is directed at the affirmative defenses of the defendants Alan Hilburg and HAI Holdings, Inc. hereinafter referred to as "Hilburg," and at the affirmative defenses of defendants Porter Novelli, Inc. and Hilburg & Associates International, LLC (hereinafter referred to as "PN.") The numbers

in the second and third columns (columns labeled "Hilburg" and "PN") refer to the paragraph numbers in the respective answers of Hilburg and PN. The last two columns (labeled "FACTUAL" and "LEGAL") show the page numbers where, in this brief, factual and legal discussion of the affirmative defenses are to be found:

Affirmative Defense	Hilburg	PN	FACTUAL Discussion in this Brief Found on Page:	LEGAL Discussion in this Brief Found on Page:
A. Statute of Limitations	25	3	3-4	10-12
B. Failure to State a Claim [FRCP 12(b)(6)]	32	1	4	13
C. Laches	24	6	4	13
D. Comparative Negligence	30	5 (in part)	4	13-14
E. Accord and Satisfaction	29	N/A	4-5	14-16
F. Ratification	26	N/A	5	16-17
G. Failure to Mitigate	27	8	5	17-18
H. Assumption of Risk	28	N/A	5	18-19
I. Unclean Hands	N/A	7	5-6	20
J. Lack of Causation	31	N/A	6	20
K. Equitable Estoppel	22	6	6	21
L. Waiver	23	6	6	22-23
M. Statute of Frauds	N/A	2	6	23-24

1 This motion is based upon the files and records herein including the following
2 memorandum and the supporting declarations of William F. Russell and Donald J. Horowitz
3 submitted contemporaneously herewith.

4 **II. FACTS**

5 **INTRODUCTION**

6
7 There are no material issues of fact regarding all of the affirmative defenses raised by
8 the defendants Hilburg and PN. The parties to this litigation are working their way toward
9 mediation but as long as there are unresolved legal claims and defenses, a risk analysis by all
10 parties is more difficult therefore rendering settlement less likely. In other words, the purpose
11 of this summary judgment motion is to clear some of the legal thickets so that the parties can
12 evaluate their respective claims more concretely.

13 **A. STATUTE OF LIMITATIONS**

14
15 The original written contract between plaintiff and defendant Hilburg was entered
16 into on August 1, 1998 [Exhibit 1 to the Complaint (docket #2)]. It had a five year term. If
17 that was the end of the matter the agreement would have expired on July 31, 2003. The
18 lawsuit was filed within the six year statute of limitations on written contracts. It was
19 commenced by service on defendant Hilburg on December 7, 2007 [docket #2] and was filed
20 in King County Superior Court on January 4, 2008 within the period for limitations of
21 actions.

22
23 Furthermore, there is no dispute that even after the formal end of the initial five year
24 period the parties continued with business as usual for many years until difficulties between
25 them arose, at which point a new contract was entered into as of March 26, 2006 [Exhibit 2
26

1 to the Complaint(docket #2)]. The relationship between them was terminated on fifteen days
2 notice from the plaintiff to defendant Alan Hilburg on or about September 6, 2006.

3 **B. FAILURE TO STATE A CLAIM [FRCP 12(b)(6)]**

4 In an email of January 8, 2009, attorneys for Mr. Hilburg waived this affirmative
5 defense, at least until the conclusion of plaintiff's case at trial. The law relating to failure to
6 state a claim has been previously briefed to this court in regard to the Porter Novelli motion
7 for dismissal [docket numbers 12 and 19]. The parties have come a long way since the initial
8 pleadings by way of documentary discovery for this to be a viable affirmative defense at this
9 point.
10

11 **C. LACHES, & D. COMPARATIVE NEGLIGENCE**

12 It is not understood exactly what defendant's basis could possibly be for the
13 affirmative defense of laches and comparative negligence.
14

15 **E. ACCORD AND SATISFACTION**

16 After the relationship between plaintiff and defendant Hilburg was terminated, efforts
17 were intensified by Donald J Horowitz to secure a full accounting for the receipts and
18 expenses by Mr. Hilburg and distributions to or on behalf of Mr. Russell, as well as to
19 account for allegations that Mr. Hilburg had invested some of Mr. Russell's funds. For a full
20 explanation and documentation see the declaration of Donald J Horowitz submitted
21 contemporaneously herewith. In short, representations were made (without documentation)
22 by Mr. Hilburg that he had taken some of Mr. Russell's funds and invested in two separate
23 investments. The first investment was in something called the Beacon Energy Fund and the
24 second was in a company Mr. Hilburg called "GreenCel." The parties corresponded about
25
26

1 return to Mr. Russell of these so-called invested funds. At trial, plaintiff will prove that the
2 funds in these two "investments" were solely by and for and with the funds of Mr. Hilburg.
3 Mr. Hilburg may be relying on correspondence about those investments for this affirmative
4 defense. See the correspondence between defendant Hilburg and Mr. Horowitz, which
5 correspondence is attached to Mr. Horowitz's declaration, including, especially, the email of
6 November 11, 2006. This email discusses a minimum payment plan to pay the then current
7 value of those invested funds to Mr. Russell, leaving open everything else including the
8 amounts originally invested and all of the issues surrounding these "investments."
9 Accordingly, ten post-dated checks, each in the amount of \$10,000 were submitted by Mr.
10 Hilburg through his company, HAI Holdings, Inc. and were sent to Mr. Horowitz who had a
11 trust account for Mr. Russell. As it turned out, even the first check bounced so there was no
12 receipt of actual funds whatsoever.

13
14
15 The evidence is undisputed (see the declaration of Donald J Horowitz) that the parties
16 were still negotiating for a full accounting of the historical monetary relationship between the
17 parties well after these checks were tendered. Mr. Horowitz made clear to Mr. Hilburg that
18 there could be no overall settlement without a full accounting.

19 20 **F. RATIFICATION, G. FAILURE TO MITIGATE, & H. ASSUMPTION OF RISK**

21 It is unknown to what facts these three defenses may pertain.

22 **I. DOCTRINE OF UNCLEAN HANDS**

23 The doctrine of unclean hands was a defense raised by PN only. It is completely
24 unknown what factual basis they may have had for asserting such an affirmative defense.
25 The defendant with more personal knowledge, Alan Hilburg, does not make this allegation.
26

1 See the Declaration of William F. Russell submitted herewith in which he denies any acts of
2 misconduct.

3 **J. LACK OF CAUSATION**

4 Lack of causation is a defense raised by Hilburg only. The factual basis for it is not
5 disclosed in the documents produced so far not in any briefing. If proximate cause is meant,
6 it is unknown how that applies to the facts of this case seeking an accounting and remission
7 of funds.
8

9 **K. EQUITABLE ESTOPPEL**

10 Equitable estoppel is a doctrine well-developed in the law. It is unknown exactly
11 what factual issues there may be in support of this doctrine as it is described in the legal
12 discussion below. The burden of proof of equitable estoppel is clear and convincing
13 evidence.
14

15 **L. WAIVER**

16 The defendants have produced no evidence that plaintiff waived any of his rights.
17 Even implied waiver requires a base of knowledge which was lacking to Mr. Russell because
18 Mr. Hilburg, to date, has still not provided an accurate comprehensive accounting.
19

20 **M. STATUTE OF FRAUDS**

21 The statute of frauds defense is raised only by PN. It is unclear what they mean
22 because there were written contracts in this case, and the lawsuit was not brought until after
23 the relationship between plaintiff and Hilburg terminated. If what PN means is that there is
24 no express written contract with PN, this is conceded. The present posture of PN is that of
25 respondeat superior and apparent authority, previously briefed.
26

III. LEGAL DISCUSSION

INTRODUCTION (PART 1): SUMMARY JUDGMENT IS APPROPRIATE

Under Rule 56(c), where the nonmoving party will bear the burden of proof on a specific claim or defense at trial, the moving party may move for summary judgment based solely on the “pleadings, depositions, answers to interrogatories, and admissions on file.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). There is no requirement “that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim.” *Id.* at 323 (emphasis in original). The burden then shifts to the nonmoving party to produce “significantly probative evidence” of specific facts showing that there is a genuine issue of material fact requiring a trial. *T.W. Elec. Service Inc. v. Pacific Elec. Contractors Assn.*, 809 F.2d 626, 630 (9th Cir. 1987) (citing Fed.R.Civ.P. 56(e)).

Genuine issues of material fact are those “factual issues that make a difference to the potential outcome and ‘that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.’” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). In other words, an issue of material fact is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

The nonmoving party cannot “withstand a motion for summary judgment merely by making allegations; rather, the party opposing the motion must go beyond its pleadings and designate specific facts by use of affidavits, depositions, admissions, or answers to

1 interrogatories showing there is a genuine issue for trial.” *In re Ikon Office Solutions, Inc.*,
2 *Sec. Lit.*, 277 F.3d 658, 666 (3d Cir.2002). If the nonmoving party fails to establish a triable
3 issue on an essential element of its case and upon which it will bear the burden of proof at
4 trial, the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at
5 322-23. Thus, the defendant has the burden of raising a genuine issue of material fact in
6 response to each of their affirmative defenses. *Digital Control Inc. v. McLaughlin Mfg. Co.*,
7 *Inc.*, 242 F. Supp. 2d (W.D. Wash., 2002). The non-moving party must produce “significant
8 probative evidence” of specific facts showing that there is a genuine issue of material fact
9 requiring trial. *T.W. Elec. Serv.*, 809 F.2d 626, 630 (C.A.9 1987) (citing Fed.R.Civ.P. 56(e)).
10

11
12 **INTRODUCTION (PART 2): THE FIDUCIARY RELATIONSHIP**
13 **BETWEEN THE PARTIES**

14 The relationship between William F. Russell and Alan Hilburg was at first a close
15 personal relationship. Upon that personal relationship a business relationship was later
16 grafted. The close personal relationship continued on after the addition of the business
17 relationship. See the Declaration of William Russell submitted herewith. The fiduciary
18 nature of this relationship is probably not going to be denied by Mr. Hilburg but, since it
19 permeates the legal standards to be applied to the case. An introduction to the law relating to
20 the relationship is warranted.

21 The defendants, most especially Alan Hilburg, owed a fiduciary duty to Mr. Russell.
22 The defendants failed in this respect completely.

23 A fiduciary relationship is defined as:

24 “[a]n expression including both technical fiduciary relations
25 and those informal relations which exist whenever one man
26

1 trusts and relies upon another. . . . It exists where there is special
2 confidence reposed in one who in equity and good conscience is
3 bound to act in good faith and with due regard to the interests of
4 one reposing the confidence.” Black’s Law Dictionary 753
(Rev. 4th ed. 1968).

5 “A fiduciary relationship arises as a matter of law in certain
6 contexts such as attorney and client, doctor and patient, trustee
7 and beneficiary, principal and agent, and between partners.”
8 *Liebergssell v. Evans*, 93 Wn.2d at 890-891, 613 P.2d 1170
9 1980.

10 A person stands in a “fiduciary relationship” to another when he has rights and duties
11 he *must* exercise for the betterment of the other party. *Westerbeck v. Cannon*, 5 Wn.2d 106,
12 104 P.2d 918 (1940). Mr. Hilburg was contractually charged with safeguarding and
13 increasing Mr. Russell’s interests and earnings.

14 Another sign of a fiduciary relationship is where the plaintiff has some dependency
15 on the defendant and likewise the defendant was advising, counseling, and purportedly
16 protecting the weaker party in the relationship. *Goodyear Tire & Rubber Co. v. Whiteman*
17 *Tire, Inc.*, 86 Wn. App. 732, 935 P.2d 628 (1997), reconsideration denied, review denied,
18 133 Wn.2d 1033, 950 P.2d 1033 (1997). Mr. Russell was dependent upon the Mr. Hilburg
19 to safeguard his earnings and look out for his interests. The defendants purported to advise,
20 counsel, and protect Mr. Russell and his earnings. Mr. Russell believed his interests were
21 being safeguarded and that Mr. Hilburg had Mr. Russell’s best interests, not his own, at the
22 forefront. To establish the presence of a fiduciary relationship there must be an indication
23 that the one reposing the trust has foundation for his belief that the one giving advice or
24

1 presenting arguments is acting not in his own behalf, but in the interests of the other party.
2 *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 340 S.E.2d 786, 790 (1986).

3 Furthermore, not only did the defendants have a business relationship with Mr.
4 Russell, but Mr. Russell and the defendants, especially Mr. Hilburg, had a relationship akin
5 to a familial relationship. Mr. Russell was Mr. Hilburg's best man. Mr. Russell held Mr.
6 Hilburg's son during circumcision. To establish a fiduciary relationship, there must be
7 something approximating business agency, a professional relationship, or family tie,
8 impelling or inducing the trusting party to relax the vigilance which he normally would
9 exercise. *Hood v. Cline*, 35 Wn.2d 192, 212 P.2d 110 (1949). Mr. Russell trusted the
10 defendants and, as is appropriate in a properly functioning fiduciary relationship, let his
11 guard down. The defendants took advantage of this.

14 A. STATUTE OF LIMITATIONS

15 This action is not time-barred. RCW 4.16.020(1) states that the statute-of-limitations
16 is six years on "(1) An action upon a contract in writing, or liability express or implied
17 arising out of a written agreement." In this case, the initial formal contract took effect on
18 August 1, 1998, and, at least nominally, would have ended on July 31, 2003. This cause of
19 action was filed on January 4, 2008, well within the six year statute-of-limitations.

21 Furthermore, the "continuous representation rule" states that the statute of limitations
22 does not begin to run until a fiduciary has ceased representation. *Janicki Logging &*
23 *Construction Company, Inc. v. Schwabe, Williamson & Wyatt P.C.*, 109 Wn. App. 655, 37
24 P.3d 309 (2001). At all times there was an ongoing contractual relationship, even before the
25 time of the two written contracts.
26

1 "... [G]eneral principles of contract law teach us that when a contract
 2 lapses but the parties to the contract continue to act as if they are
 3 performing under a contract, the material terms of the prior contract
 4 will survive intact unless either one of the parties clearly and
 5 manifestly indicates, through words or through conduct, that it no
 6 longer wishes to continue to be bound thereby, or both parties
 7 mutually intend that the terms not survive." *Luden's, Inc. v. Local*
Union No. 6, 28 F.3d 347, 355-56 (3d Cir.1994).

8 Washington's courts agree. For example, our courts have said:

9 "[w]here a contract of employment for a definite term expires, and the
 10 employee continues to render the same services, the presumption is
 11 that he is serving under a new contract having the same terms and
 12 conditions." *Holton v. Hart Mill Co.*, 24 Wn.2d 493, 495, 496, 166
 13 P.2d 186 (1946).

14 "When a contract of employment for a definite time has been made, and
 15 the employee's services are continued after the expiration of the definite
 16 time without objection, the inference is ordinarily that the parties have
 17 assented to another contract for a term of the same length with the same
 18 salary and conditions of service, based on an analogy to a similar rule
 19 applicable to leases." 2 Williston on Contracts sec. 6:42 at 452-454.

20 "If the parties at the expiration of a written contract of employment,
 21 continue as before without a new express agreement, it will be inferred
 22 that the service and the compensation are the same as before." 4 Corbin
 23 on Contracts sec. 22.11 at 753.

24 Outside of Washington State, courts have come to similar conclusions about the
 25 continuation of contracts. In *Brandenburg v S.F. & G. Company*, 207 MD. 413, 114 A.2d
 26 604 (1955), the Court cites *Martin v Campanaro*, 156 F.2d 127, 129 (2nd Cir., 1946)
 certiorari denied 329 U.S. 759, 67 S.Ct. 112, 91 L.Ed. 654:

27 "When an agreement expires by its terms, if without more, the parties
 28 continue to perform as theretofore, an implication arises that they have
 29 mutually assented to a new contract containing the same provisions as the
 30 old. Ordinarily, the existence of such a new contract is determined by the
 31 'objective' test, i.e., whether a reasonable man would think the parties

1 intended to make such a new binding agreement—whether they acted as if
2 they so intended”.

3 Thus, the statute of limitations did not commence in this case any earlier than
4 September 6, 2006, the date upon which Mr. Russell severed his contractual relationship
5 with Mr. Hilburg.

6 Washington’s “discovery rule” also supports the fact that the statute of limitations
7 began to run well after September 6, 2006. Washington’s “discovery rule” states that a
8 cause-of-action accrues when a party knows or reasonably should have known all the
9 essential elements of the possible cause-of-action. *Clare v. Saberhagen Holdings, Inc.*, 129
10 Wn. App. 599, 602, 123 P.3d 465 (2005). The discovery rule is applicable in cases including
11 fraud, See *Freitag v. McGhie*, 133 Wn.2d 816, 947 P.2d 1186 (1997); conversion, See
12 *Crisman v. Crisman*, 85 Wn. App. 15, 931 P.2d 963 (1997); and breach of fiduciary duty,
13 See *Germain v. Pulman Baptist Church*, 96 Wn. App. 826, 980 P.2d 809 (1999). Mr.
14 Russell did not know the essential elements of this cause of action until after September 6,
15 2006.
16
17

18 In fact, the “continuous tort” rule argues for the fact that in this case the statute of
19 limitations has not even commenced. The “continuous tort” rule says a tort is continuing
20 until the action at issue ceases. *Bradley v. American Smelting & Refining Co.*, 104 Wn.2d
21 677, 693, 709 P. 2d 782 (1985). Mr. Hilburg continues to refuse to provide a full accounting,
22 an action at the core of Mr. Russell’s complaint.
23
24
25
26

B. FAILURE TO STATE A CLAIM [FRCP 12(b)(6)]

See the factual section for reference to previous briefing. This portion of this summary judgment motion is directed only to PN.

C. LACHES

Laches does not apply. Under RCW 4.16.040(1), an action on a written contract must be commenced within six years. Absent highly unusual circumstances, a court generally is prohibited from imposing a shorter period under the doctrine of laches than under the relevant statute of limitations. *Brost v. L.A.N.D., Inc.*, 37 Wn. App. 372, 375, 680 P.2d 453 (1984). The equitable doctrine of laches may only be used to bar an action when 1) the plaintiff knew the facts constituting a cause-of-action, 2) the plaintiff unreasonably delayed commencing an action, and 3) the defendant was materially prejudiced by the delay in bringing the action. *Davidson v. State*, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991). Mere delay, lapse of time and acquiescence do not, standing alone, bar a claim short of statute of limitations. There must also be an intervening change in position on the part of the defendant, making it inequitable to enforce the claim. *Arnold v. Melani*, 75 Wn.2d 143, 147, 148, 437 P.2 908, 449 P.2d 800, 450 P.2d 815 (1968); see also *Brost*, 37 Wn. App. at 375, 376, 680 P.2d 453. For example, in *Davidson*, supra, laches was found applicable because the plaintiff waited *sixty-two years* to bring a cause-of-action. Mr. Russell, however, took action as soon as Mr. Hilburg's misappropriation of Mr. Russell's earnings became apparent.

D. COMPARATIVE NEGLIGENCE

No facts exist for there to be a material issue of fact that Mr. Russell was comparatively negligent. Such a doctrine is inapplicable in a case such as this involving

(Hilburg's) intentional breach of fiduciary duty by concealing and appropriating Mr. Russell's earnings. Intentional acts are not included in the statutory definition of "fault" in Washington's comparative fault statute—RCW 4.22.070. *Welch v. Southland Corp.*, 134 Wn.2d 629, 635, 952 P.2d 162 (1998). Intentional torts are "part of a wholly different legal realm" from the apportionment mechanism contained in RCW 4.22.070. *Price v. Kitsap Transit*, 125 Wn.2d 456, 464, 886 P.2d 556 (1994). Negligence will not diminish the weight of positive, willful fraud. 12 S. Williston, Contracts § 1515B, at 487 (3d ed. 1970).

In addition, our case addresses a contractual relationship. Mr. Russell obviously was not party to a contract allowing for the apportioning of comparative negligence in the case of misrepresentation or fraud. In fact, a court almost certainly would never sanction such a contract in the first place. See *Alejandre v. Bull*, 123 Wn. App. 611, 626, 98 P.3d 844 (2004).

E. ACCORD AND SATISFACTION

Mr. Russell reached no "accord" with, let alone received "satisfaction" from, Mr. Hilburg. An "accord" is an agreement for settlement of a claim by performance of something other than that due, and is governed by contract principles. *Boyd-Conlee Co. v. Gillingham*, 44 Wn.2d 152, 155, 266 P.2d 339 (1954). "Satisfaction" occurs when the accord is performed. *Buob v. Feenaughty Machinery Company*, 191 Wn. 477, 485, 71 P.2d 559 (1937). The formal elements of "accord and satisfaction" are (1) the existence of a bona fide dispute, (2) an agreement to settle the dispute, and (3) performance of the agreement. *Ward v. Richards & Rossano, Inc., P.S.*, 51 Wn. App. 423, 429, 754 P.2d 120, reconsideration denied, and review denied, 111 Wn.2d 1019 (1988). Furthermore, when a

1 fiduciary argues accord and satisfaction, a fourth element is required—the accord must be
2 evidenced by an express agreement that was made with the creditor’s full knowledge of all
3 relevant information. *Id.* The elements of accord and satisfaction must be proved by the
4 one asserting that accord and satisfaction has occurred. *Kibler v. Garrett & Sons, Inc.*, 73
5 Wn.2d 523, 527, 439 P.2d 416 (1968); 1 Am.Jur.2d Accord and Satisfaction § 15 Et seq.
6 (1962).
7

8 Neither accord nor satisfaction has occurred. While certainly there is now a dispute,
9 there has been no agreement how to settle the matter. In fact, Mr. Hilburg has yet to provide
10 an accounting necessary to determine the amounts at issue and *begin* a resolution process. No
11 accord is established where the amount owed remains open to further negotiation. *U.S. Bank*
12 *Nat. Ass’n v. Whitney*, 119 Wn. App. 339, 351, 81 P.3d 135 (2003) citing *Kibler*, *supra*, 73
13 Wn.2d at 527. Furthermore, without full accounting from Mr. Hilburg Mr. Russell cannot
14 even make an accurate claim. There cannot be accord and satisfaction unless there is a claim
15 or demand. *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wn. App. 327, 334, 493 P.2d 782
16 (1972).
17

18 At no time did Mr. Hilburg express to Mr. Russell that the tendering of the ten post-
19 dated checks represented a full settlement of all (or even some of) the disputes known or
20 unknown. The debtor must make intentions clear for purposes of accord and satisfaction.
21 *Kibler*, 73 Wn.2d at 526. Remittance of a check from a debtor to creditor does not constitute
22 accord and satisfaction unless the creditor is placed on notice that the check is tendered on
23 condition that acceptance discharges the debt. *Washington Fish & Oyster Co. v. G.P.*
24 *Halferty & Co.*, 44 Wn.2d 646, 654, 269 P.2d 806 (1954). Mr. Russell never agreed that a
25
26

1 series of postdated checks would discharge even the debt related to the narrow investment at
2 issue represented by the checks, let alone that the checks would discharge the entire amount
3 owed to Mr. Russell representing Mr. Hilburg's years of conversion and breach of fiduciary
4 duty. The bounced check compromised even the purported agreement regarding the
5 investment addressed by the checks. An unpaid installment is a material breach of a
6 settlement agreement. See *Jacks v. Blazer*, 39 Wn.2d 277, 286, 235 P.2d 187 (1951). A
7 party is barred from enforcing a contract that it has materially breached. *Bailie*
8 *Communications, Ltd. v. Trend Bus. Sys.*, 53 Wn. App. 77, 81, 765 P.2d 339 (1988).

10 F. RATIFICATION

11 The doctrine of ratification does not apply, both as a matter of law and a matter of fact.
12 Ratification as a legal doctrine occurs when a party who knows he has been defrauded
13 chooses to continue to receive benefits under the contract at issue. *Simms v. Robison*, 142
14 Wn. 555, 253 P.788 (1927). A party ratifies an otherwise voidable contract if, after
15 discovery of facts that would warrant rescission after discovery of fraud, the party remains
16 silent or continues to accept benefits under contract. *Ward v. Richards & Rossano, Inc. P.S.*,
17 51 Wn. App. 423, 754 P.2d 120, reconsideration denied, and review denied, 111 Wn.2d 1019
18 (1988). Ratification in law is a species of estoppel. If found it estops the defrauded party
19 from rescinding the contract. A plaintiff can not ask for rescission of a contract and at the
20 same time sue for breach thereof. *Johnson v. Associated Oil Co. of California*, 170 Wn. 634,
21 17 P.2d 44 (1932).

1 Thus, as a matter of law, the doctrine of ratification does not apply in this case. Mr.
 2 Russell is not seeking rescission of the contracts. Mr. Russell terminated the contract in
 3 September 2006. Mr. Russell is seeking a proper accounting and return of his earnings.

4 Furthermore, Mr. Russell was at no time aware during the life of contract that he was
 5 being defrauded. So even if Mr. Russell had taken some action that clearly affirmed a
 6 contract, it would not have been ratification because Mr. Russell had no knowledge he was
 7 being defrauded. A party charged with ratification of a contract must have acted voluntarily,
 8 with full knowledge of the facts. *McCormick v. Lake Washington School Dist.*, 99 Wn. App.
 9 107, 114, 107 P.2d 511 (1999); *Hooper v. Yakima County*, 79 Wn. App. 770, 904 P.2d 1193
 10 (1995).
 11

12 G. FAILURE TO MITIGATE

13 The doctrine of avoidable consequences, or mitigation of damages, is an affirmative
 14 defense that prevents an injured party from recovering damages that could have been avoided
 15 through reasonable efforts. *Bernsen v. Big Bend Electric Coop.* 68 Wn. App. 427, 435, 842
 16 P.2d 1047 (1993); *Bullard v. Bailey*, 91 Wn. App. 750, 959 P.2d 1122 (1998). Thus, not
 17 only must a defendant demonstrate that a plaintiff failed to mitigate, but also that the failure
 18 to mitigate was unreasonable. *Martin v. Northwest Washington Legal Services*, 43 Wn. App.
 19 405, 717 P.2d 779 (1986). The burden of proving failure to mitigate falls squarely on the
 20 shoulders of the defendants. *Hauser v. Department of Law*, 368 F.3d 1091 (9th Circuit
 21 2004); *Sutton v. Shufelberger*, 31 Wn. App. 579, 582, 643 P.2d 920 (1982). For example, the
 22 Ninth Circuit Model Civil Jury Instruction 5.3 (Damages—Mitigation) states:
 23

24 “The defendant has the burden of proving by a preponderance of the evidence:
 25
 26

- 1 (1) That the plaintiff failed to use reasonable efforts to mitigate damages; and
- 2 (2) The amount by which damages would have been mitigated.”

3 Defendants both fail to support their assertion that Mr. Russell failed to mitigate and
 4 fails to put forth an amount to which Mr. Russell allegedly should have mitigated. In
 5 addition, a plaintiff has no duty to mitigate damages the defendant has an equal or better
 6 opportunity to mitigate. *Walker v. TransAmerica Title Ins. Co.*, 65 Wn. App. 399, 405, 828
 7 P.2d 621 (1992).

8 H. ASSUMPTION OF RISK

9 Mr. Russell did not assume the risk that Mr. Hilburg would breach his fiduciary duty.
 10 The doctrine of assumption of risk traditionally has four subcategories: express assumption
 11 of risk, implied assumption of risk, implied reasonable assumption of risk, and implied
 12 unreasonable assumption of risk. *Scott v. Pacific W. Mt. Resort*, 119 Wn.2d 484, 843 P.2d 6
 13 (1992). The third and fourth subcategories, implied reasonable and implied unreasonable
 14 assumptions of risk, are now simply synonyms for contributory negligence. *Id.* at 497.

15 Express assumption of risk generally is bargained for and found in contractual
 16 relationships. *Kirk v. Washington State University*, 109 Wn.2d 448, 746 P.2d 285 (1987). A
 17 person expressly assumes the specific risk of harm if that person 1) has full subjective
 18 understanding 2) of the presence and nature of the specific risk and 3) voluntarily chooses to
 19 encounter the risk. *Id.* Nowhere in the contracts signed between Mr. Russell and Mr.
 20 Hilburg did Mr. Russell expressly assume the risk at issue. For example, Mr. Russell
 21 obviously did not authorize Mr. Hilburg to conduct unauthorized investments. In the first
 22 contract, signed in 1998, the contract stated that sums held on behalf of Mr. Russell were to
 23
 24
 25
 26

1 be invested *only* pursuant to Mr. Russell's instructions or consent. Furthermore, in the
2 second contract signed in 2006, the terms called for any monies received by the defendant to
3 be sent "immediately" to Mr. Russell.

4 Mr. Russell also did not implicitly assume any risk. Implied assumption of risk
5 operates in the same way as express assumption of risk, except that express formalities are
6 not present. *Dorr v. Big Creek Wood Products, Inc.* 84 Wn. App. 420, 927 P.2d 1148
7 (1996). Otherwise, the elements are the same. The plaintiff must have 1) had full subjective
8 understanding 2) of the presence and nature of the specific risk, and 3) voluntarily chose to
9 encounter the risk. *Taylor v. Baseball Club of Seattle, L.P.*, 132 Wn. App. 32, 130 P.3d 835
10 (2006). In our case, just as with express assumption of risk, it cannot be argued that Mr.
11 Russell had 1) full subjective understanding 2) of the presence and nature of a risk that 3) he
12 voluntarily chose to take.

13 There also was no implied reasonable assumption of risk by Mr. Russell. Implied
14 reasonable assumption of risk refers to a plaintiff that, aware of a risk negligently caused by
15 a defendant, chooses to still go forward with the action at issue that puts him at risk. David
16 Horton, *Extreme Sports and Assumption of Risk: A Blueprint*, 38 U.S.F. L. Rev 599 (2004);
17 *Scott by and Through Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6
18 (1992). Mr. Russell never chose to proceed with a risk caused by Mr. Hilburg.

19 The last of the four subcategories of assumption of risk, implied unreasonable
20 assumption of risk, also does not apply. Implied unreasonable assumption of risk exists if a
21 person voluntarily and unreasonably continues with a known risk created by another's
22 negligence. *Shorter v. Drury*, 103 Wn.2d 645, 695 P.2d 116 (1985).

I. DOCTRINE OF UNCLEAN HANDS

Mr. Russell at all times conducted himself in an appropriate manner and the defense has produced no evidence to the contrary, let alone evidence that Mr. Russell's behavior was "unconscionable." The doctrine of unclean hands means simply that a court will not entertain a request for equity from a party whose behavior in the matter at issue was unconscionable. *J.L. Cooper & Company v. Anchor Securities Company*, 9 Wn.2d 45, 113 P.2d 845 (1941). Unconscionable behavior is behavior that no reasonable person can justify. *In re Greer*, 61 Wn.2d 741, 380 P.2d 482, (1963). Unconscionable behavior in a contract action refers to action taken that no one in his or her senses, not under delusion, would make, and which no fair and honest person would accept. *Nelson v. McGoldrick*. 73 Wn. App. 763, reconsideration denied, review granted 125 Wn.2d 1008, reversed 127 Wn.2d 124, 896 P.2d 1258 (1994). To refer to anything Mr. Russell did as unconscionable is completely inappropriate. The affirmative defense of unclean hands is yet another defense thrown out with absolutely no explanation or evidence and designed to stall an accounting and obstruct.

J. LACK OF CAUSATION

The defendant's allege "lack of causation," but it is entirely unclear what this means. Once again this is a response put forth by the defense but with no accompanying explanation. Are the defendant's conceding damages but claiming not to be the cause? It is rather convenient to claim lack of causation and then actively withhold information that contradicts such an assertion. Regardless, once again, the defense puts forth nothing to substantiate the claim of "lack of causation."

K. EQUITABLE ESTOPPEL

Equitable estoppel does not apply. Equitable estoppel in its simplest term means “estoppel by conduct.” *Ross v. Harding*, 64 Wn.2d 231, 391 P.2d 526 (1964). The party asserting equitable estoppel must have been induced to alter his position in such a way that he will be injured if the other person is not held to the representation or attitude on which the estoppel is predicated. *Daly v. Volpe*, 376 F.Supp. 987, affirmed 514 F.2d 1106 (W.D Wash 1974). Equitable estoppel requires three elements: admission, statement or act inconsistent with a claim afterward asserted; action by other party on faith of such admission, statement or act; and injury to such party resulting from allowing first party to contradict or repudiate such admission, statement or act. *Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System*, 104 Wn.2d 353, 705 P.2d 1195 (1985).

Equitable estoppel must be shown by clear and convincing evidence. *Lilly v. Lynch*, 88 Wn. App. 306, 318, 945 P.2d 727 (1997).

The defendants have failed to establish any of the three elements of equitable estoppel, clearly and convincingly or any other way. The defendants have produced nothing indicating that Mr. Russell acted in a manner inconsistent with his present position. Secondly, the defendants have failed to demonstrate any act taken by them as a result of Mr. Russell’s alleged action. The defendants’ assertion of equitable estoppel is misplaced. Mr. Russell did nothing to sanction the actions at issue and the defendants have produced nothing to the contrary.

L. WAIVER

Mr. Russell never chose to “waive” his rights. Waiver, express or implied, is intentional relinquishment or abandonment of a known right or privilege. *Keyes v. Bollinger*, 31 Wn. App. 286, 640 P.2d 1077 (1982). Waiver is manifested by actions inconsistent with any other intention than to waive. *Caterpillar Tractor Co. v. Collins Machinery Co.*, 286 F.2d 446 (9th Cir. 1960); *Ives v. Ramsden*, 142 Wn. App. 369, 174 P.3d 1231 (2008). In *Caterpillar Tractor*, the court found that a waiver had not occurred, even though a party had said they would not sue at the time at issue. The court found that even if a person states at a particular time that they will not sue at that time, that does not mean the party is forgoing the possibility of filing a future claim.

Existence of intent to waive must clearly appear in order to show a waiver. *State ex rel. Madden v. Public Utility Dist. No. 1 of Douglas County*, 83 Wn.2d 219, 517 P.2d 585, appeal dismissed, certiorari denied *Public Utility District No. 1 of Douglas County, Washington v. Madden*, 95 S.Ct. 20, 419 U.S. 808, 42 L.Ed.2d 33 (1973); *O'Connor v. Tesdale*, 34 Wn.2d 259, 209 P.2d 274 (1949). In *O'Connor v. Tesdale*, it was found that absent an express or implied agreement between the parties, acceptances of goods under terms of a lease by a party compelled to do so for the survival of his enterprise did not somehow discharge the seller from overhanging issues related to the item being leased. *Id.* at 263.

Waiver must be distinct and unequivocal. *Mid-Town Ltd. Partnership v. Preston*, 69 Wn. App. 227, 848 P.2d 1268, reconsideration denied, review denied 859 122 Wn.2d 1006, 859 P.2d 603 (1993). Intent will not be inferred from doubtful or ambiguous facts. *TMT*

1 *Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 165
2 P.3d 1271 (2007). In *Mid-Town Ltd. Partnership*, the closing date on a real-estate deal had
3 been extended by addendum to the original contract. However, due to financing and other
4 complications, the deal still did not close on that day, although both parties continued to take
5 action toward completing the sale. Ultimately, the seller changed its mind and the buyer
6 sued for specific performance. The court found that an extension of the closing date,
7 followed by action indicating that both parties were still trying to effect the deal, was not a
8 distinct and unequivocal indication that the purchase contract had been extended. *Id.* at 233,
9 234. In *TMT Bear Creek Shopping Center, Inc.*, the court ruled that a landlord's acceptance
10 of a termination check from a tenant did not waive the landlord's right to damages involving
11 the tenant's defective performance of the lease. *Id.* at 207, 208.

14 M. STATUTE OF FRAUDS

15 The statute of frauds is not applicable in this case as a matter of law. Under
16 Washington's statute of frauds, "[e]very agreement that by its terms is not to be performed in
17 one year from the making . . . shall be void unless such agreement, contract or promise, or
18 some note or memorandum thereof, be in writing, and signed." *RCW 19.36.010*. The
19 agreements between plaintiff and Hilburg were in writing. Mr. Russell and the defendants
20 signed a five year contract that took effect August 1, 1998, and ran, and least nominally, until
21 July 31, 2003. A second contract was signed on March 26, 2006. That contract clearly met
22 the requirements of the statute of frauds.
23
24
25
26

1 Furthermore, upon the nominal termination of the contract on July 31, 2003, the
2 parties continued for years their contractual relationship as if nothing had changed. See the
3 briefing regarding the legal effect of this conduct, on pages 10-11 above.

4 Perhaps most importantly, though, Mr. Russell and the defendants acted at all times
5 between 1998-2006 as if an agreement was still in effect. Full performance by even one
6 "party" removes even an oral contract from the statute of frauds. *Rutcosky v. Tracy*, 89
7 Wn.2d 606, 574 P.2d 382, certiorari denied 99 S.Ct. 317, 439 U.S. 930, 58 L.Ed.2d 323
8 (1978).

10 IV. CONCLUSION

11 It appears that both defendants answered the complaint by including any possible
12 affirmative defenses that might be applicable. The documentary discovery done to date does
13 not support any of the affirmative defenses. Some of them border on the frivolous.
14 However, their continued existence in the case without judicial resolution adversely affects
15 the settlement possibilities and complicates the next phase of discovery. It is hoped that the
16 court will grant the motion in full. It is also hoped that this can be decided as rapidly as
17 possible because the case is becoming more time-critical.
18

19 Respectfully submitted this 8th day of January, 2008.

21 DAVID J. BALINT, PLLC

22
23 By: /S/ David J. Balint
24 David J. Balint (WSBA #5881)
25 Of Attorney for Plaintiff
26